



- (2) Whether an order contrary to the uncontroverted evidence is an abuse of discretion; and, if so
- (3) Whether that abuse of discretion constitutes a denial of due process; and, if so
- (4) Whether that denial of due process constitutes the ALJ exceeding his jurisdiction so as to give the Board jurisdiction on appeal from a preliminary hearing order to decide this case.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs submitted by the parties, the Appeals Board finds that claimant's appeal from the preliminary hearing Order by the ALJ should be dismissed.

This is an appeal from a preliminary hearing. K.S.A. 1997 Supp. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. This includes specific jurisdictional issues identified in K.S.A. 1997 Supp. 44-534a. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment and temporary total disability benefits is not an argument the Appeals Board has jurisdiction to consider. K.S.A. 1997 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation. After considering all of the evidence presented, including the medical reports and evidence introduced at the April 1997 hearing, the ALJ terminated benefits. In doing so, the ALJ did not exceed his jurisdiction.

The claimant may preserve those issues for final award as provided by K.S.A. 1997 Supp. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review at this juncture of the proceedings the preliminary hearing Order dated April 21, 1998, entered by Administrative Law Judge John D. Clark and that this review should be, and hereby is, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

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**CONCURRING OPINION**

The undersigned concurs with the dismissal of this appeal, but agrees with claimant's argument that the Board should accept jurisdiction and reverse the ALJ's Order if the Order was contrary to the uncontroverted evidence.

(1) Is the ALJ's Order contrary to the uncontroverted evidence?

There is no dispute concerning the compensability of this claim. Furthermore, the only evidence submitted at the April 21, 1998, hearing is that claimant has not reached maximum medical improvement and is in need of continued medical care. If that were the only evidence in the record, K.S.A. 44-510(a) would require that reasonable medical compensation be furnished by the employer.

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The only recent medical opinion in evidence is from the authorized treating physician, Dr. Laurie A. Browngoehl. No other medical evidence was offered or introduced at the April 21, 1998, hearing. Contrary medical opinions were introduced, however, at the April 8, 1997, and March 20, 1996, preliminary hearings. Those records indicated that claimant did not need additional treatment but those records are now all over a year old. Because of their age, it would seem that those records are largely irrelevant to the issues

of whether claimant is presently at maximum medical improvement and whether claimant is currently in need of continued medical treatment. Furthermore, for whatever reason, the ALJ previously rejected those contrary opinions and ordered additional medical treatment be provided. His Order terminates that treatment without any mention of those earlier opinions and contrary to the current evidence on claimant's present medical condition. Nevertheless, because there is some evidence in the record to support the ALJ's decision, the Order is not contrary to the uncontroverted evidence.

(2) Is an order contrary to the uncontroverted evidence an abuse of discretion?

In the past, the Board has held that the ALJ has jurisdiction to decide issues of medical and temporary total disability at a preliminary hearing. Additionally, the ALJ has jurisdiction to decide these and other issues incorrectly. See Barrington v. Georgia Pacific Corporation, Docket No. 223,480 (November 1997).

A different result may arise, however, when a decision is clearly contrary to the uncontroverted evidence. The appellate courts have noted that "[a] decision which is contrary to the evidence or the law is sometimes referred to as an abuse of discretion, but it is nothing more than an erroneous decision, or a judgment rendered in violation of law." Saucedo v. Winger, 252 Kan. 718, 730, 850 P.2d 908 (1993). An abuse of discretion occurs when support for the agency's decision is lacking in the record. For instance, in Timmerman v. Schroeder, 203 Kan. 397, 454 P.2d 522 (1969), a jury verdict was rendered which was contrary to uncontroverted evidence and was arrived at by disregarding the plain instructions of the district court. The Supreme Court held that the trial court acted unreasonably and arbitrarily in refusing to grant a new trial under those circumstances and that such a refusal constituted an abuse of discretion. "An agency's action is arbitrary and capricious if it is unreasonable or without foundation in fact." Sunflower Racing, Inc. v. Board of Wyandotte County Comm'rs, 256 Kan. 426, Syl. ¶ 3, 885 P.2d 1233 (1994).

Based upon the preceding cases, it appears the appellate courts would find a decision which is contrary to the uncontroverted evidence to be an abuse of discretion. But abuse of discretion is not the basis for determining Appeals Board jurisdiction on an appeal from a preliminary hearing order. For that, there must be an allegation that the ALJ exceeded his jurisdiction in granting or denying the relief requested. K.S.A. 1997 Supp. 44-551(b)(2)(A).

(3) Does the abuse of discretion constitute a denial of due process?

"The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case." Collins v. Kansas Milling Co., 207 Kan. 617, 620, 485 P.2d 1343 (1971). No particular form of proceeding is required to constitute due process in administrative proceedings. What is required is "that liberty and property of the citizen be protected by

rudimentary requirements of fair play.” 73 C.J.S. Public Administrative Law and Procedure § 59. These requirements include:

[T]he revelation of evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason . . . [an] administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Whether or not a person has been deprived of due process of law by the actions of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative . . . body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.

Id. (Emphasis added). See *also* Johnstown Coal & Coke Co. v. Dishong, 84 A.2d 847, Syl. 5 (1952), holding that “[a] finding unsupported by any evidence is beyond the power of an administrative agency as a denial of due process.” Kaufman v. Kansas Dept. of SRS, 248 Kan. 951, 811 P.2d 876 (1991); Peck v. University Residence Committee of Kansas State Univ., 248 Kan. 450, 807 P.2d 652, (1991); Kansas Racing Management, Inc. v. Kansas Racing Comm’n, 244 Kan. 343, 770 P.2d 423 (1989).

Not every abuse of discretion would constitute a denial of due process. But, if an ALJ’s findings and decision were not supported by any evidence, then his actions could be deemed arbitrary and capricious and constitute a denial of due process.

(4) Does a denial of due process constitute an ALJ exceeding his jurisdiction so as to give the Board jurisdiction on appeal from a preliminary hearing order to decide this case?

In Graham v. A+ Sweeping, Inc., Docket No. 206,881 (June 1997), the Board found that an action by the ALJ, which constituted a denial of due process, exceeded the ALJ’s jurisdiction under K.S.A. 1997 Supp. 44-551. See *also* Church v. White Star Commercial Coating and McPherson Contractors, Inc., Docket No. 204,042 (August 1996).

The discretion vested in an administrative agency is not absolute or unlimited. “This discretion must be exercised in accordance with the established principles of justice . . . and . . . sound judgment.” 73A C.J.S. Public Administrative Law and Procedure §60. Agency action “must be both legal and reasonable . . .” Id. By implication then, agency action which is not reasonable, denies the parties due process or is arbitrary and capricious, such as making findings which are not based upon the evidence in the record, exceeds that agency’s discretion/jurisdiction.

The ALJ, while having the authority to decide a case incorrectly, cannot make a decision which is not based upon any evidence in the record. To make such a decision constitutes an unreasonable, arbitrary and capricious act on the ALJ's part which denies due process to the parties involved. I agree with the argument by claimant that such an act also exceeds the discretion/jurisdiction of the ALJ. But, because there was some evidence in the record that claimant had reached maximum medical improvement, I agree with the conclusion by the majority that the ALJ did not exceed his jurisdiction. This appeal from the preliminary hearing Order must be dismissed.

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BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS  
P. Kelly Donley, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director